to represent him. At this stage the learned judge asked the accused to reconsider his plea. The learned judge further said that he would give accused further time to think or have another counsel assigned if he so wished. The accused replied that he did not wish to reconsider his plea and that he maintained his plea of guilty. The Deputy Public Prosecutor gave the facts of the case to the court. The applicant said that he admitted the facts and had nothing to say in mitigation. He merely asked for the return of his personal belongings. The learned judge then convicted the applicant on his plea on both charges and passed sentence of death.

Mr. Jagjit Singh appeared before us on behalf of the applicant. He referred to the applicant's affidavit and then said that his strongest ground in support of the application was that the applicant should not have been charged under the Internal Security Act, but should have been charged under the Firearms (Increased Penalties) Act. Counsel for the applicant conceded that the facts of the case and the consequences of the applicant's plea were explained to him but emphasised the applicant's frame of mind when he pleaded guilty to the charges.

Mr. Mahalingam appeared on behalf of the respondent. He said that from the English authorities it was abundantly clear that the Federal Court had inherent jurisdiction to order a retrial where conviction was passed on a plea of guilty which was a nullity. He then submitted that it was for the applicant to show that he tendered his plea of guilty under pressure or threats or in circumstances in which he could make no free choice but was driven to adopt a certain course whether he liked it or not.

The view which we took was that for the application to succeed there had to be strong grounds or substantial reasons. There was nothing to suggest that the applicant did not understand the points in issue when he was produced before the High Court. After he had pleaded guilty he was asked by the learned judge to reconsider his decision. The applicant said that he did not wish to reconsider the matter. The facts of the case were explained to him and he admitted them. There was nothing to suggest that on the merits the appeal was likely to succeed. The sentence which was passed on him was the only sentence which could be passed in the circumstances of the case. On the whole we were satisfied that there was no merit whatsoever in the application. We had therefore no option but to dismiss it.

Application dismissed.

Solicitors: *Jagjit Singh & Co.*

CHAI TZE FOH & ANOR. v. ASIA FISHING INDUSTRY PTE. LTD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and Tan Chiaw Thong JJ.) June 13, 1977]

[Kuching — Federal Court Civil Appeal No. 40 of 1976]

Practice and Procedure — Contempt of court — Application for writ of attachment — Contravention of order of court — Burden of proof.

Sale of Goods — F.O.B. Contract — Property does not pass to purchaser at time of contract.

The respondents had applied for a writ of attachment against the appellants. It was alleged that the appellants had interfered with the respondent's use and enjoyment of certain factory premises and that they had removed from the factory premises various cartons of prawns and that both actions were in contravention of an order of the High Court. The learned trial judge gave judgment in favour of the respondents and the appellants appealed.

Held: (1) the order of court in this case was unambiguous and was not rendered ambiguous by the undertaking given by the appellants to operate the factory;

(2) the appellants were in breach in disposing of the prawns. The contract relating to the prawns was an F.O.B. contract and property in the prawns had not passed to the purchaser, as alleged by the appellants;

(3) in refusing to open the factory gate to allow the respondents to enter the premises, the appellants were wilfully disobeying the order;

(4) the learned trial judge had rightly held that the respondents had proved their charges beyond reasonable doubt.

Cases referred to:

(1) *T.O. Thomas* v. *Asia Fishing Industry Pte. Ltd.* [1977] 1 M.L.J. 151.

(2) *Iberian Trust Ltd.* v. *Founders Trust and Investment Company* [1932] 2 K.B. 89, 95.

FEDERAL COURT.

Daniel Tajem for the appellants.

C.T. Wong for the respondents.

Lee Hun Hoe C.J. (Borneo): I have the advantage of reading the judgment of Chang Min Tat J. with which I concur. There is nothing I can usefully add except to say that most of the points taken in *T.O. Thomas* v. *Asia Fishing Industry Pte. Ltd.*[1] have been repeated in this appeal and the same answers apply.

It was in the interest of the parties to keep the factory going to prevent damages to the prawns in the cold room. The defendants gave the undertaking to operate the factory. I agree with Chang Min Tat J. that the undertaking was for the purpose of operating the factory and not for the purpose of running the business. The undertaking did not render the Court Order ambiguous. Further, the Court Order was never suspended and must be obeyed.

Curiously enough the day when the contract for the sale of prawns was purported to be executed coincided with the dismissal of all the staff of plaintiff company. The only way defendants thought they could justify the disposing of the prawns was to contend that the contract was not F.O.B. Therefore, they had done nothing against the Court Order as the property in the prawns had passed to the buyer on the execution of the contract. The contract was before us and was meant, as clear as a pikestaff, to be

an F.O.B. contract. What was done after the Court Order became effective was clearly contempt.

The appeal is dismissed with costs here and in the court below.

Chang Min Tat J. (read by Lee Hun Hoe C.J. (Borneo)): An application by notice of motion by the plaintiffs in their action for liberty to issue a Writ of Attachment against the two defendants was grounded on two allegations. The defendants were alleged first to have interfered with the plaintiffs' use and enjoyment of the factory premises at Lot 4479 Section 64 Kuching Town Land until July 16, 1975 and secondly, to have removed from the factory premises various cartons of prawns, both actions being said to be in contravention of an order of the High Court in Kuching made on May 30, 1975.

Since a doubt was cast on the certainty of the order of court, it is necessary that it be set down. The terms are that subject to the usual undertaking as to damages, the defendants by their servants or agents were restrained and an injunction was granted restraining them and each of them from

(a) disposing of or removing any property or assets of the firm of East Malaysia Sea Products Company until the trial of this action or further order; and

(b) interfering with the plaintiffs' use and enjoyment of the said firm's factory premises at Lot 4479 Section 64 Kuching Town Land District Sungei Priok, Kuching.

The event originating the claim of action was a memorandum of transfer signed on September 4, 1974 by the 1st defendant as registered proprietor in favour of the plaintiffs of the land in question. It was duly registered on December 3, 1974. The consideration was stated to be $350,000 but the defendants alleged that despite the acknowledgment in the transfer of full payment, it had not been fully paid and lodged a caveat on May 2, 1975 against the transfer of the land. On this land a factory had been built and it was operated under the firm name of East Malaysia Sea Products Co. (EMSP). It was owned by the defendants. The agreement between the parties appeared to include the sale and transfer of their business together with its assets and accordingly memoranda of transfers were prepared for the transfer of the business of EMSP together with all the goodwill, assets and liabilities including the firm name and of two ships. The plaintiffs executed these memoranda but the defendants did not.

The learned trial judge found on the affidavit evidence and on the cross-examination of the defendants that (1) the 1st and 2nd defendants had wilfully disposed of or removed from the cold room of the factory various cartons of frozen prawns, the property or assets of EMSP during July 1975, thereby being in disobedience of the first limb of the injunction order and (2) the 1st defendant had wilfully disobeyed the second limb of the order on July 4, 1975 when acting on legal advice he refused to open the factory gate to allow the plaintiffs' representatives entry into the factory premises. After submission, he fined the 1st defendant $10,000 and the 2nd defendant $5,000.

From that order the defendants appeal to this court.

Before dealing with the main grounds of appeal, it is to be observed that an application to set aside the order of injunction was refused and an appeal from that refusal to the Federal Court was dismissed.

No appeal is directed against the finding of fact that the 1st and 2nd defendants had wilfully disposed of the frozen prawns. The fact of disposal must be taken to have been proved beyond reasonable doubt. But an argument was raised that in the course of the hearing, the defendants gave an undertaking to the court on June 20, 1975, June 23, 1975 and July 5, 1975 "to operate and to continue operating the factory" and that this resulted either in the virtual destruction of the first limb of the injunction, or in making the order so indefinite as in law to excuse the defendants from having to comply therewith. The law on injunctions was carefully and in detail considered by the learned trial judge. It is only necessary for the purpose of this appeal to repeat that before a court will punish anyone for not carrying out its order, the order must in unambiguous terms direct what is to be done: see, *inter alia Iberian Trust Ltd.* v. *Founders Trust and Investment Company.*[2] But to contend that the undertaking rendered the order ambiguous is far from correct. The defendants were in factual occupation. It was necessary that the refrigeration plant be kept going in order to preserve the prawns, etc. in the cold room. Somebody was required to operate the factory. There should be an early determination of the matter in view of the nature of the contents of the cold room. The various postponements for new and further affidavits and evidence could only be granted if the factory was kept in continuous operation. The court required an undertaking to this purpose. The defendants were prepared to give it. And in terms of the undertaking, the defendants undertook and therefore were permitted to operate the factory, not run the business, a different matter altogether. There was therefore no conflict between not disposing of the assets and operating the factory and consequently there was no ambiguity, as the learned trial judge found. The first point that the appellants took on the ambiguity of the order in the light of the subsequent undertaking therefore fails.

The disposal though carried out on several occasions was averred to be in purported performance of a single contract between EMSP and Nanyang Frozen Foods Sdn. Bhd. On that reasoning the appellants took the point that they were not in breach. The contract is, be it noted, though no point was taken on it, unstamped. It is so remarkable as much for its contents as for the construction sought to be put on it that it deserves to be set out in full.

"SALES AND PURCHASE CONTRACT

THIS SALES AND PURCHASE CONTRACT is made this 28th day of May 1975 between MESSRS. EAST MALAYSIA SEA PRODUCTS CO., of Lot 4479, Section 64 Sungei Priok, Kuching, Sarawak (hereinafter called the 'VENDOR') and MR. J.S. VOON of NANYANG FROZEN FOODS SDN. BHD., of Old Kubu Road, Sarikei, Sarawak (hereinafter called the 'PURCHASER'). The vendors hereby agreed to supply and sell and the purchaser hereby agreed to accept and purchase the following type of prawns according to the prices and quantities as stated below:—

1. *Headless Prawns White*

Sizes	*FOB Prices Per Kg.*	*Quantities*
3/12; 13/15; 16/20	US$4.00)	
21/15	US$3.00)	
26/30	US$2.60)	
31/40	US$2.20)	10.76 M/T
41/50	US$1.70)	
51/60	US$1.30)	
61/70	US$1.10)	
71/90	US$1.00)	

2. *White Head-On*

Sizes	*FOB Prices Per Kg.*	*Quantities*
U/15	M$4.00)	
16/20	M$4.00)	
21/30	M$3.00)	
31/40	M$2.20)	10.76 M/T
41/60	M$2.00)	
60/80	M$1.40)	

3. *Pink Headless*

Sizes	*FOB Prices Per Kg.*	*Quantities*
21/25	M$2.00)	
26/30	M$2.00)	
31/40	M$1.60)	0.52 M/T
41/50	M$1.60)	
51/60	M$1.20)	

4. *Raw Meat*

FOB Prices Per Kg. US$0.50 Quantities 6.08 M/T.

5. *Peeled and Deveined Prawns*

Sizes	*FOB Prices Per Lb.*	*Quantities*
16/20	M$1.60)	
21/25	M$1.60)	
26/30	M$1.60)	
31/35	M$1.30)	
36/40	M$1.30)	
41/50	M$1.00)	8,850 lbs.
51/60	M$1.00)	
61/70	M$0.80)	
71/80	M$0.50)	
81/120	M$0.50)	
121/200	M$0.50)	
Broken	M$0.30)	

Sign by PURCHASER (SGD.)
Witness: (SGD.)"

Sign by VENDOR (SGD.)

It bears the date May 28, 1975. There is of course no certainty in view of the failure to stamp it that it was executed on the date shown, but if it was, it anticipated the injunction by a mere 2 days and it was not completed or even began to be effected when the order was made, the disposals being carried out on July 2, July 7, July 14 all at the unexplained hour of 3 a.m. and again on July 14 at 7.30 a.m. It was averred by the defendants and their contention was colloborated by one Voon of Nanyang Frozen Foods Sdn. Bhd. that the total consideration was $104,574 of which $80,000 was paid on the execution of the agreement and the balance of $24,574 was paid on August 18, 1975.

It was contended that the agreement was not an F.O.B. sale, that the words F.O.B. incorporated in it were surplusage and without meaning and that the property in the prawns passed to the purchaser on the execution of the agreement, so that in "disposing" of the prawns, the defendants were only doing what the law would compel them to do at the instance of the purchaser. With the greatest of respect, nothing could be further from the truth. There is nothing within the four corners of the agreement to indicate that the sale was of specific goods or that the words F.O.B. were surplusage. They must be given their full meaning and effect. The proof of this lies in the document itself. It is impossible to quantify the value of the contract and learned counsel for the appellants had not been able to explain how, for instance, in the first category of prawns, Headless Prawns White, the total quantity specified of 10.76 metric tons was in fact made up of the various sizes set down. In the absence of any specifications for the actual sizes, it is impossible to say what the value of the contract will be. If for instance, more of the dearer qualities were delivered, the value will be greater than if the cheaper quality prawns were delivered to make up the tonnage. And for that matter, if the sale was for specific goods in the cold room and not for prawns to be caught, it surely was the easiest matter to quantify the prawns in their various classes and sizes. For myself, I am unable to understand why the appellants had not at any time before actually disposing the prawns, advised the respondents that they were doing so in performing their contract of sale, if the contract was genuine and in their view they were bound to perform it. I am also unable to understand why they did not leave it to the respondents to perform it or face an action for specific performance.

The learned trial judge thought the evidence of this sale irrelevant. With respect, having regard to the impossibility of relating the allegations to the terms, I have some doubt as to the genuiness of the document. But in any event and with respect, I agree with the learned trial judge that there was no uncertainty that after May 30, 1969 the defendants would be in breach if they disposed of any of the assets, even under the purported cover of this sale to Nanyang Frozen Foods Sdn. Bhd. and that in so doing, they were in contempt.

As for the breach of the 2nd limb, there was no dispute between the parties of the wilful refusal of the 1st defendant to open the factory gate to allow the plaintiffs' party to enter the factory. The dispute was over the intention of the plaintiffs' party. The learned trial judge found on a careful review of the evidence that the party did not attempt to take over possession of the factory, that any suggestion of this was due to a slip on the part of the plaintiffs' solicitor which was subsequently corrected, and that the purpose was to have the use and enjoyment of the place. From Kanaoka's affidavit, it would appear that their purpose was to check on whether there had been disposals of the factory's assets.

The learned trial judge accordingly held that refusing to open the factory gate to allow the party to enter for the purpose of exercising their right to use and enjoy the property was wilful disobedience of the 2nd limb of the order. With respect, I am not prepared to disagree with his finding.

Next, it was said that the respondents had not proved their charges beyond reasonable doubt. This burden was accepted, correctly, by the plaintiffs. The learned trial judge found they had. With respect, it seems to me that there was no dispute on the fact of

the refusal to open the gate and the only question was the effect of this refusal. Since the respondents were given by the court the use and enjoyment of the factory, the wilful refusal to open the gate to them could not be anything but a breach.

Lastly, much was made of whether the defendants were or were not properly served with the order of court. The learned trial judge made a careful study of the relevant provisions regarding service and came to the conclusion that there had been such service to fasten the defendants with the obligation to obey. No criticism was directed at the appeal to this finding and I say no more about it except perhaps respectfully to agree with the learned judge.

I would therefore dismiss the appeal with costs.

Tan Chiaw Thong J. (read by Lee Hun Hoe C.J. (Borneo)): I agree.

I would only add a few words. In relation to the breach of the first limb of the Order of the Lower Court dated May 30, 1975 restraining the defendants from disposing of or removing any property or assets of the firm of East Malaysia Sea Products Company until the trial of the action or further order, it has been contended by learned counsel for the appellants that there was a conflict of evidence in the affidavits of Tan Boon Ting alias Chen Boon Yueh and Tan Lian Huat affirmed in support of the plaintiffs' case. It was said that in relation to the third occasion on which frozen prawns were removed from the cold room of the factory and loaded into two vessels, Tan Boon Ting alias Chen Boon Yueh stated in his affidavit that it was on July 14, 1975 at about 3.00 a.m. whereas Tan Lian Huat said that it was at about 7.30 a.m. on the same date. In my view, reading the two affidavits together, it cannot be said that there was such a conflict in the evidence given on affidavit by Tan Boon Ting alias Chen Boon Yueh and Tan Lian Huat because in the latter's affidavit he stated that it was on the date and time given by him when he arrived at the factory that he saw more than 10 persons removing frozen prawns from the cold room of the factory and loading them into motor vessels East Malaysia No. 2 — FT695 and Yun Chen — FT727 and that the operation was supervised by the defendants. In his affidavit Tan Boon Ting alias Chen Boon Yueh did not mention the second defendant in relation to the removal and loading of the frozen prawns and further, he said that the operations were done by the first defendant together with his eldest brother and several other people. On the evidence I do not think it would be a fair and reasonable inference to conclude that the third occasion mentioned in the affidavit of Tan Boon Ting alias Chen Boon Yueh referred to the same occasion specified by Tan Lian Huat, although the loading was made into the same vessels. In my view, on the evidence the fair and proper inference to be drawn is that the time mentioned by Tan Boon Ting alias Chen Boon Yueh and that stated by Tan Lian Huat referred to different occasions. Accordingly, in my view there is no conflict in the evidence given by Tan Boon Ting alias Chen Boon Yueh and Tan Lian Huat.

With regard to the breach of the second limb of the Order of the Lower Court, by the appellants interfering with the plaintiffs' use and enjoyment of the factory premises, much has been said about what was stated in paragraph 1 of the affidavit of Sim Teck Kui affirmed on July 18, 1975, that on July 4, 1975 at about 10.45 a.m. he went with his party including E. Kanaoka and Jemali bin Satong with the intention to take over the possession of the factory premises. On this point, having carefully considered the evidence the learned trial judge came to the conclusion that he was satisfied that Sim made a slip when he deposed in his affidavit that the intention was to take over the possession of the factory premises when in actual fact he and his party wanted to enter for the purpose of making use and enjoying the said premises under the second limb of the Court Order of May 30, 1975. It was said that there was no corrective affidavit from Sim Teck Kui and that if the relevant parts of the affidavit of Chung Nyuk Swee, Chief Clerk of Messrs. Thomas & Company had been taken into account the learned trial judge would not have come to the conclusion which he did. I do not think that this contention is sound for the following reasons.

It is true that Sim Teck Kui in his affidavit of July 18, 1975 stated that his visit on July 4, 1975 with a party was with the intention of taking over the possession of the factory premises but his affidavit would have to be considered in the light of the rest of the evidence including the affidavit of Jemali bin Satong affirmed on July 21, 1975 and that of E. Kanaoka affirmed on October 3, 1975. Jemali bin Satong in his affidavit stated that they went there to see if the defendants would comply with the Court Order of May 30, 1975 without any intention to break in nor was any attempt to break in made; and Kanaoka in his affidavit said that they went to see if the defendants would allow them to go into the premises peacefully, as required by the Court Order of May 30, 1975. Chung Nyuk Swee in his affidavit stated that at or about 10.50 a.m. on July 4, 1975, that is, very soon after the arrival of Sim Teck Kui and his party at the gate of the factory, the first defendant telephoned him that Sim had asked him to open the gate but he refused to do so before consulting his lawyer Mr. Thomas. There was nothing in the affidavit of Chung to indicate that when the party headed by Sim went to the factory premises it was with the intention of taking possession of them. Indeed, in paragraph 9 of Chung's affidavit, he stated that after the arrival of Thomas, Sim told Thomas that he and his men had the right to enter and showed Thomas copy of the Court Order of May 30, 1975. In such circumstances, I do not consider that it can be said that the learned trial judge had drawn the wrong inference from the evidence. It seems clear from the evidence that at the material time, the terms of the Court Order of May 30, 1975 were very much present in the mind of Sim.

As regards sentence, learned counsel for the appellants had submitted that an order for the payment of costs and their convictions would be sufficient punishment on the appellants having regard to the social framework within which they fell. It has not been shown that the learned trial judge had erred in principle or gave the wrong considerations or failed to give consideration to relevant factors before he

sentenced the appellants. I do not think that much need be said on the appeal against sentence except to point out that the learned trial judge had heard arguments on the matter and it has not been demonstrated that any relevant factors had not been borne in mind by the learned trial judge before he sentenced the appellants. In the circumstances the sentence cannot be said to be wrong in principle or excessive. Accordingly, I would dismiss the appeal against sentence.

Appeal dismissed.

Solicitors: *Thomas & Co.; Yong & Co.*

KONG POH ING v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and George Seah JJ.) June 13, 1977]

[Kuching — Federal Court Criminal Appeal No. 50 of 1976]

Criminal Law and Procedure — Murder — Defence of accident — Not adequately put to assessors.

The appellant appealed against her conviction for murder. The defence of the appellant was one of accident but this defence was not adequately put to the assessors. The assessors were not told that if they accepted the defence of accident, the appellant was entitled to be acquitted.

Held, allowing the appeal: as the defence of accident was not adequately put by the judge in his summing up there was a possibility that this might have led the assessors to take a wrong view of the law. It could not confidently be said on a proper and reasonable reading of the summing up that the assessors would have returned the verdict they did return, if they had been adequately directed on the defence of accident.

Cases referred to:-

(1) *R.* v. *Immer* 13 Cr. App. R. 22.
(2) *R.* v. *Frampton* 12 Cr. App. R. 202.
(3) *R.* v. *Brookes* 21 Cr. App. R. 112.
(4) *R.* v. *Ong Choon* [1938] M.L.J. 227.
(5) *Mensah* v. *R.* A.I.R. 1948 P.C. 20.
(6) *Ratnam* v. *R.* [1937] M.L.J. 222.

FEDERAL COURT.

Joseph Tang for the appellant.

Abdul Hamid bin Mohamed Yusof (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J. (delivering the judgment of the Court, read by Lee Hun Hoe C.J. (Borneo)): We allowed the appeal against conviction on a charge of murder under section 302 Penal Code and set aside the sentence of death by hanging passed. We now give our reasons.

The person whom the accused was charged with murdering was her boy-friend whom under a promise of marriage she had allowed to seduce her. The prosecution could produce no eye witnesses to the incident. The evidence consisted largely of dying declarations allegedly made by the deceased before his death. These witnesses were all members of the deceased's family, who could not but be regarded as interested witnesses. The main and common gist of their evidence was that the deceased had said that the accused had stabbed him. Their accounts, however, varied, not only with one another, in the context of their evidence in court but also in at least two instances, when set against their depositions at the Preliminary Enquiry. One of these was a young lad, to whom an affirmation was not administered by reason of his tender age and who were merely warned to speak the truth. Both were allowed to be impeached. When the evidence of these several witnesses is compared, it is a matter of some uncertainty whether at the stabbing incident, the accused was accompanied by two others or whether she was alone. Some said she was not alone. Others failed to testify to the presence of her companions. This question is of great importance to the defence, which was that of accident and which will be dealt with later, but for the moment we note that there are at least two factors which bear greatly on the uncertainty of this evidence and on the failure to resolve it by a definite direction to the assessors. Firstly, the medical evidence raises some doubt whether at the relevant time the deceased had recovered sufficiently from the anaesthesia administered to him for the operation he had to undergo, to be able to utter the declarations in question. Secondly, there would appear to be at least two independent witnesses in the persons of the nurses attending on the deceased at this time. From their proximity to the deceased, they could not reasonably have avoided hearing what the deceased was alleged to have said, if he had said anything. These witnesses were not produced. Reliance was placed entirely on members of the deceased's family.

The other evidence against the accused consisted of her statement to the police which in the law in force in Sarawak at the relevant time was admissible in evidence against her. It proved that the stabbing was by her. The statement was reduced in writing. In it, she admitted to a desire to commit suicide, in the presence of the deceased. She wished to reproach him by this demonstration for his betrayal in now refusing to marry her. For this purpose she waited for him. She had brought with her a knife for the purpose she had in mind. When he came, she showed him the knife. Then according to her, he hugged her and told her not to die. There was an obvious attempt to wrench the knife away from her. They fell. He was stabbed. She ran away. This statement was introduced as part of the prosecution evidence, and raised for the first time the defence of accident.

The medical evidence was one stab wound that penetrated the stomach and jejunum and lacerated the abdominal aorta. Death was due to shock from massive haemorrhage. In the light of the defence put up, the fact that there was only one stab wound must assume some significance.

In her defence, which in our view and with respect, was rightly called, the accused testified on oath what she had said in her statement to the police. She gave her evidence in greater detail, and throughout her testimony, she maintained her reliance on accident.

The summing-up was in great detail. For the purpose of the appeal, it is sufficient to observe that the learned judge dwelt on intention to cause death as being one of the main ingredients of murder. He considered the possibility of the main charge of murder